IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SPECIAL CIVIL APPLICATION NO. 5723 OF 1988
(SHARMA METAL ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 6915 OF 1988
(SHRI RAJENDRA ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 2101 OF 1989
(UDAYA UYDOG)

WITH

SPECIAL CIVIL APPLICATION NO. 2195 OF 1989
(GAGLANI UDYOG)

WITH

SPECIAL CIVIL APPLICATION NO. 2460 OF 1989
(TRIVENI MARBLES PVT. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 4582 OF 1988
(SHAKTI ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 748 OF 1988
P.T. MEHTA INDUSTRIES & ANR

WITH

SPECIAL CIVIL APPLICATION NO. 6794 OF 1988
(J K STEEL & ALLOWYS)

WITH

SPECIAL CIVIL APPLICATION NO. 6795 OF 1988
(VIDYA WIRES PVT. LIMITED)

WITH

SPECIAL CIVIL APPLICATION NO. 6796 OF 1988
(NARANLALA ROLLING PVT. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 6913 OF 1988
(ARIHANT METALS)

WITH

SPECIAL CIVIL APPLICATION NO. 5491 OF 1988
(SWAMI NARAYAN STEEL RE-ROLLING MILL)

WITH

SPECIAL CIVIL APPLICATION NO. 6914 OF 1988
(SAKARIYA METAL ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 5924 OF 1988
(ATLAS WIRES PVT. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 5925 OF 1988
(MAHESHWAR STEEL ROLLING MILL)

WITH

SPECIAL CIVIL APPLICATION NO. 5926 OF 1988
(VICTOR STEEL INDUSTRIES)

WITH

SPECIAL CIVIL APPLICATION NO. 5927 OF 1988
(MOHAN METALS)

WITH

SPECIAL CIVIL APPLICATION NO. 5928 OF 1988
(MADHUSUDAN STEEL & RE-ROLLING WORKS)

WITH

SPECIAL CIVIL APPLICATION NO. 5929 OF 1988
(KAMAL METAL ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 5930 OF 1988
(BHUPENDRA IRON STEEL RE-ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 3563 OF 1991
(SURYAVIJAY WOODEN SAW MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 5964 OF 1988
(NAVSARI PROCESSING INDUSTRY)

WITH

SPECIAL CIVIL APPLICATION NO. 5965 OF 1988
(GURU BHOMIYA METAL INDUSTRIES)

WITH

SPECIAL CIVIL APPLICATION NO. 5966 OF 1988
(TRIVEDI IRON & STEEL INDUSTRIES)

WITH

SPECIAL CIVIL APPLICATION NO. 5967 OF 1988
(JALARAM INDUSTRIES)

WITH

SPECIAL CIVIL APPLICATION NO. 5968 OF 1988
(PATEL STEEL CRAFT & RE-ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 5969 OF 1988
(INDIA STEEL ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 5970 OF 1988
(JAGDISH UDYOG)

WITH

SPECIAL CIVIL APPLICATION NO. 5971 OF 1988
(B.R. METAL INDUSTRIES)

WITH

SPECIAL CIVIL APPLICATION NO. 5972 OF 1988
(ROLLING MILLS (INDIA) & ORS.)

WITH

SPECIAL CIVIL APPLICATION NO. 5973 OF 1988
(LALIT METAL INDUSTRIES)

WITH

SPECIAL CIVIL APPLICATION NO. 6011 OF 1988
(ATUL STEEL ROLLING MILLS PVT. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 6012 OF 1988
(NARAN LAL METAL WORKS LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 6013 OF 1988
(MEHTA UDYOG)

WITH

SPECIAL CIVIL APPLICATION NO. 6014 OF 1988
(SULEKH RAM & SONS STEEL ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 6015 OF 1988
(SHREE ATUL METAL RE-ROLLING MILL)

WITH

SPECIAL CIVIL APPLICATION NO. 6016 OF 1988
(SWASTIK IRON & STEEL ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 6017 OF 1988
(RAJKAMAL RE-ROLLING ENGINEERING CO.)

WITH

SPECIAL CIVIL APPLICATION NO. 6018 OF 1988
(AHMEDABAD STEEL CRAFT & ROLLING MILLS PVT. LTD)

WITH

SPECIAL CIVIL APPLICATION NO. 6019 OF 1988
(LAXMI STEEL ROLLING MILL)

WITH

SPECIAL CIVIL APPLICATION NO. 6020 OF 1988
(IRON & ROLLING MILLS PVT. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 6111 OF 1988
(AHMEDABAD ADVANCE MILLS LIMITED)

WITH

SPECIAL CIVIL APPLICATION NO. 6112 OF 1988
(ORION STEEL CORPORATION)

WITH

SPECIAL CIVIL APPLICATION NO. 6113 OF 1988
(ORION WIRES MFG. CO.)

WITH

SPECIAL CIVIL APPLICATION NO. 6114 OF 1988
(SIRHIND STEEL PVT. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 6115 OF 1988
(PRAKASH INDUSTRIES)

WITH

SPECIAL CIVIL APPLICATION NO. 6116 OF 1988
(PARRY ENGG. & ELECTRONICS PVT LTD)

WITH

SPECIAL CIVIL APPLICATION NO. 6117 OF 1988
(MAHA GUJARAT STEEL ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 6253 OF 1988
(INDUSTRIAL FASTNERS OF GUJARAT PVT. LTD)

WITH

SPECIAL CIVIL APPLICATION NO. 6254 OF 1988
(AMBICA RE-ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 6255 OF 1988
(PUNJAB STEEL ROLLING MILLS PVT. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 6256 OF 1988
(MALHOTRA STEEL INDUSTRIES PVT. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 6310 OF 1988
(GUJARAT IRON & STEEL CO. LTD.)

WITH

SPECIAL CIVIL APPLICATION NO. 6375 OF 1988
(GANDHI IRON & STEEL RE-ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 7729 OF 1988
(MOHANLAL CHOTALAL RAJORA)

WITH

SPECIAL CIVIL APPLICATION NO. 8420 OF 1988

(SOMNATH STEEL INDUSTRIES)

WITH

SPECIAL CIVIL APPLICATION NO. 1427 OF 1989
(VIJAPUR TALUKA POWER LOOMS)

WITH

SPECIAL CIVIL APPLICATION NO. 1538 OF 1989
(PREMIER RE-ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 2591 OF 1989
(DIVAYANG ROLLING MILLS)

WITH

SPECIAL CIVIL APPLICATION NO. 7272 OF 1989
(AJAYKUMAR RAMESHCHAND JAIN)

WITH

SPECIAL CIVIL APPLICATION NO. 3563 OF 1990
(PERFECT BRIGHT STEEL INDS.)

WITH

SPECIAL CIVIL APPLICATION NO. 2190 OF 1991
(MAHENDRA & COMPANY)

WITH

SPECIAL CIVIL APPLICATION NO. 3561 OF 1991
(KALYAN SAW MILL)

WITH

SPECIAL CIVIL APPLICATION NO. 3562 OF 1991
(BHARAT SAW MILL)

WITH

SPECIAL CIVIL APPLICATION NO. 611 OF 1992
(M/S. WELDING ROD MFG. CO.)

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Appearance:
IN ALL MATTERS EXCEPT SCA NO. 2460/89, 7729/88,

1427/89, 2591/89, 7272/89, 3561/91, 3562/91

MR. KS NANAVATI for petitioners

IN SCA NO.2460/89
MR S.K. JHAVERI for petitioners

IN SCA NO.7729/88
MR RA MISHRA for petitioners

IN SCA NO.1427/89
MR KIRIT I PATEL for petitioners

IN SCA NO. 2591/89
MR BK DAMANI for petitioners (Absent)

IN SCA NO. 7272/89
Mr. NAGIN M GANDHI for petitioner

IN SCA NO. 3561/91 & 3562/91
MR. MANISH R BHATT for petitioners (Absent)

FOR RESPONDENTS

MR JM THAKORE, ADVOCATE GENERAL with MR AD OZA, GOVT. PLEADER with MS. DEVANI, A.G.P. for State
MR. MD PANDYA for Gujarat Electricity Board
MR. HB SHAH for Ahmedabad Electricity Co. Ltd.

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CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE B.C.PATEL

Date of decision: 20/06/2000

C.A.V. JUDGEMENT (Per Patel, J.)

In this group of matters, petitioners have prayed for a declaration that section 2 (2) (a) and Section 3 of the Bombay Electricity Duty (Gujarat Amendment) Act, 1988 (Gujarat Act No. 7 of 1988) are unconstitutional and ultravires being violative of the fundamental rights guaranteed under Part III of the Constitution of India and, therefore, unenforceable as against the petitioners and consequently, have prayed to quash and set aside the demand at Annexure 'A' to the petition.

2. With a view to dispose of this group of matters, short facts are required to be taken into consideration, and such facts, as it appears in one of the Special Civil

Applications, being Spl. C.A. No. 5723/81, are as under :-

2.1 The petitioner firm used to purchase re-rollable scrap from the ship-breaking yard at Alang. The petitioner used to manufacture flat bars upto 5 mm. in thickness of various sizes. The petitioner unit is classified as a Small Scale Unit, and, therefore, the unit was paying electricity duty at the rate of 10% as applicable at the relevant time under the Bombay Electricity Duty Act. The liability of the petitioner for making payment at 10% was on the basis of having only low tension connection.

2.2 However, from October 1986 to June 1988, the third respondent, Gujarat Electricity Board (for brevity, Board, hereinafter), raised a demand for electricity duty at 30%. The petitioner paid the same as per the demand at 30% from October 1986 to June 1988. For the first time in or about August 1988, the second respondent raised a demand enhancing the rate of electricity duty at 30% with retrospective effect from October 1982 to October 1986 on the basis of the Gujarat Electricity Duty (Amendment) Ordinance, 1988. This Ordinance has been replaced by Gujarat Electricity Duty (Amendment) Act No. VII of 1988. The petitioner's unit was treated as a "Service Undertaking" under the ordinance and thereafter under the Act.

2.3 It is contended by the petitioner that at no point of time, the petitioner firm was engaged in any job work. The petitioner was manufacturing flat bars for its own, and not for any one else on job work basis. For the purpose of running the unit, power is supplied by the Board, the third respondent, through low tension connection, and, therefore, as contended by the petitioner, it was required to pay at the prescribed tariff and the electricity duty to the concerned respondent under provisions of Bombay Electricity Duty (Gujarat Amendment) Act 1988.

2.4 In this connection, it is relevant to note here that earlier Special Civil Applications were filed in this High Court being Spl. C.A. No. 3190 of 1984 and other allied matters by GUJARAT RE-ROLLING MILLS' ASSOCIATION AND OTHERS v/s. STATE OF GUJARAT & OTHERS reported in 1988 (1) GLH 414, decided by a Division Bench of this Court (Coram: P.R. Gokulakrishnan, CJ and G.T. Nanavati, J) on 1.2.1988. It was contended that the petitioners are not "service undertakings" within the meaning of amended Section 2 (ee) of the Bombay

Electricity Duty Act, 1958 but are "industrial undertakings" within the meaning of amended section 2 (bb) read with explanation thereto of the Bombay Electricity Duty Act, 1958 and are therefore liable to pay electricity duty under item No. 5.A of the First Schedule to the Bombay Electricity Duty Act, 1958 read with amended section 2 (bb) thereof. The Division Bench of this Court, after considering various contentions raised by rival parties for interpreting the phrases "service undertaking" and "industrial undertaking", held that the "service undertaking" occurring in section 2 (ee) of the Act will relate only to job work. In view of this, it is submitted that as the petitioner unit was engaged in the manufacture and production of goods, it could be only covered in the category of "industrial undertaking". In the aforesaid case, the Division Bench directed the second Respondent to examine the case of each petitioner on facts bearing in mind the guidelines given in the judgment.

3. It is contended before us that the first and second respondents occupied themselves with the implementation of the aforesaid judgment, issued notices to some of the petitioners to attend the hearing before the 2nd respondent and to furnish the relevant data necessary for a decision. It it further contended that however, the 1st respondent in the meanwhile moved the appropriate machinery and ultimately an Ordinance known as Gujarat Ordinance No. 3/88 called the Bombay Electricity Duty (Gujarat Amendment) Ordinance 1988 was promulgated with a view to further amend the Bombay Electricity Duty Act, 1958. Thereafter, the State Legislature by Gujarat Act No. 7 of 1988 called the Bombay Electricity Duty (Gujarat amendment) Act, 1988, amended Bombay Electricity Duty Act, 1958. It is in this background the case before us is to be appreciated.

4. So far as industrial undertaking is concerned, prior to Gujarat Act No. 17 of 1983, explaining section 3 (2)(vii)(b)(i) defined Industrial Undertaking as under:

> "An industrial undertaking means an industrial undertaking which manufactures or produces goods for sale or use in the manufacture or production of other goods but does not include an undertaking which manufactures or produces any kind of goods and drinks meant ordinarily for consumption on the premises of the undertaking, and .... "

4.1 This definition of industrial undertaking was

deleted and instead, by Gujarat Act No. 17 of 1983, Section 2 (bb) and section 2 (ee) have been inserted which read as under:-

"(bb). "industrial undertaking" means an undertaking engaged predominantly in the manufacture or the production of goods (other than eatables or drinks) or engaged in any job work involving the manufacture or the production of goods irrespective of whether any service of the nature specified in clause (ee) is involved in such job work, but does not include a service undertaking;

Explaination.- For the purpose of this clause and clause (ee) an undertaking shall be construed to be engaged predominantly in the manufacture or the production of goods or, as the case may be, in providing service of the nature specified in clause (ee), if the gross income of such undertaking from the manufacture or the production or, as the premises of the undertaking is greater in relation to gross income from other activity of the undertaking in the same premises".

"(ee). "service undertaking" means an undertaking which is engaged predominantly in providing all or any of the following services, namely :-

(i). repairs, renovation, reconditioning, restoration, restitution or preservation,
(ii). Cleaning
(iii). Polishing or pressing
(iv). Cutting ore pressing
(v). drawing, stretching, twisting, rolling, re-rolling or orientation of non-ferrous and ferrous material including stainless steel materials,
(vi) case hardening, carbonising or any other surface treatment,
(vii). coating of any surface with any material.
(viii). electronic data processing.
(ix). such other service as the State Government may, by notification in the official gazette specify."

5. In view of the definition of "service undertaking", activities of rolling, re-rolling or orientation of non-ferrous and ferrous material including

stainless steel materials were sought to be considered as service undertaking despite the fact that the unit was engaged in manufacture for itself. The Division Bench in the case of Gujarat Re-Rolling Mills (supra) considered the lengthy submissions and after considering the statement of objects and reasons held in paragraph 7 of the judgment that "the words 'providing all or any of the following services' occurring therein can only mean job work. In such a job work, if there is manufacture or production of goods, the same will come under the category of industrial undertaking irrespective of the fact whether any service of the nature specified in clause (ee) is involved in such job work".

6. The Division Bench, in paragraph 7 further held that:

> "Section 2 (ee) which defines the service undertaking clearly states that, such undertaking engages predominantly in providing all or any of the services enumerated therein. Hence, it is clear that providing service can only be for others and it will relate to only job work."

6.1 In the same paragraph, the Division Bench further observed that:

> "The definition further makes it clear that the job work involving manufacture or production of goods is considered to be industrial undertaking irrespective of the fact whether any service of the nature specified in clause (ee) is involved in such job work. No doubt, Section 2 (bb) clearly excludes from the definition of "industrial undertaking" the service undertaking:.

6.2 In paragraph 8 the Division Bench further held that:

> "When we read section 2 (bb), the enactment has made it clear that even if an undertaking is engaged in any job work in manufacturing or production of goods, it will not go out of the purview of industrial undertaking irrespective of the fact that the said undertaking in manufacturing or producing adopts any one of the processes mentioned in Section 2 (ee). This makes it clear that, for categorising an undertaking under Section 2 (ee), it must be a service undertaking pure and simple. An

undertaking is said to come under the service undertaking only when that undertaking serves the other party who approaches it for the purpose of services enumerated in Section 2 (ee). If in the process of such service any manufacture or production comes into existence, then also the said undertaking which renders such service will fall under definition of "industrial undertaking" mentioned in section 2 (bb)."

6.3 In paragraph 8, the Division Bench further held:

"To put in nutshell, if by any of the processes mentioned in Section 2 (ee), the value or utility is added, then it will be service undertaking. But if the nature or character of the articles gets changed or the use to which it can be put is different then it will have to be regarded as manufacture or production of new item which will make that undertaking as industrial undertaking. This is the test that has to be adopted in deciding as to whether an undertaking is an industrial undertaking or a service undertaking. We have already held that the definition of service undertaking occurring in Section 2 (ee) of the Act relates only to job work".

7. Learned counsel Mr. Nanavati for the petitioners submitted that in view of this decision, it was made clear that if the nature or character of an article gets changed or the use to which it can be put is different, then it will have to be regarded as manufacture or production of a new item which will make the undertaking an industrial undertaking.

8. On behalf of the respondents, it is contended that a unit might be engaged in the activities of manufacture for itself and might be doing work on job work basis. With a view to attract the duty at a higher rate if the unit is engaged in both type of activities, then how the duty is to be calculated would be a question. In the explanation clause, therefore, it was mentioned that an undertaking shall be construed to be engaged predominantly in the manufacture or the production of goods or as the case may be, in providing service of the nature specified in clause (ee) in the amended act w.e.f. 11.10.1983 by Act No. 17/83, if the gross income of such undertaking from the manufacture or the production or, as the premises of the undertaking is greater in relation to gross income from other activity of the undertaking in the same premises. It was

submitted that the unit engaged in the manufacture for itself and manufacture on job work basis was expected to be governed by this provision. However, we are not entering into any discussion on this aspect as the view already taken by the Division Bench has become final and it is binding to the respondent State and other authorities. The petitioner unit is engaged in manufacture for itself is also required to be considered. In one case, a unit may be engaged only in manufacture or production of goods. In another case, a unit may be engaged in the manufacture or production of goods and also engaged in the nature of rendering services, (which cannot be said to be manufacture or production of goods) as referred in service undertaking. In third type of case, a unit may be engaged only in rendering services. The words 'industrial undertaking' if read it becomes clear that over and above manufacture or production of goods, it also includes job work which results in manufacture or production of goods. Therefore, what was intended to bifurcate was purely manufacture or production of goods and other than manufacture or production of goods. For attracting 'industrial undertaking' it does not matter reading the clause 'industrial undertaking' that one is manufacturing or producing for its own business or for others.

9. It is required to be noted that so far as 'industrial undertaking' as found in clause (bb) is concerned, it has been made operative from 11.10.1983 to 21.7.1987 by Act No. 7 of 1988. So far as clause (ee) is concerned, it has been deemed to have been substituted for the period commencing on the date of coming into force of the Bombay Electricity Duty (Gujarat amendment) Act, 1983 and ending on the 21st July 1987. It is interesting to note that the ordinance known as Gujarat Electricity Duty (Amendment) Ordinance, 1988 came into force atonce on the date of notification and its Statement as found in the Ordinance indicates that the provision is made with a view to rationalising the rates of electricity duty and augmenting the financial resources of the State. It is further stated in the statement as under :-

> "The Gujarat High Court has recently decided Special Civil Applications filed by certain undertakings which have been treated as service undertakings, by interpreting the aforesaid definitions of "industrial undertaking" and " service undertaking" according to which interpretation most of the service undertakings providing services involving manufacture or

production of goods will have to be treated as industrial undertakings.

This interpretation of the aforesaid definitions made by the High Court is not in consonance with the intention of the Legislature. If the competent authority has to decide the cases remanded to it by the High Court in the light of the High Court decision, it would result in substantial loss of revenue to the Government as undertakings which have paid duty as service undertakings will have to be treated as industrial undertakings and huge amounts will have to be refunded to them. With a view to making the intention of the Legislature in this behalf clear from the date of coming into force of the Amending Act, it is proposed to substitute the definitions of "industrial undertaking" and "service undertaking" with retrospective effect i.e. from 11th October 1983.

The Minister of State (Energy) has made an announcement on the floor of the Gujarat Legislative Assembly on the 22nd July 1987 to consider levying lesser duty on service undertakings falling under items (v) and (vii) of the existing clause (ee) of section 2 so that they could be covered under the definition of "Industrial Undertaking". It is, therefore, proposed to exclude undertakings falling under items (v) and (vii) of the said clause (ee) from the proposed new definition of "service undertaking" with effect from the 22nd July 1987 with a view to implementing the aforesaid announcement."

10. So far as "Industrial Undertaking" and "Service Undertaking" are concerned, Ordinance of 1988 reads as under:-

2. Bom. XL of 1958 to be temporarily amended.- During the period of operation of this Ordinance, the Bombay Electricity Duty At, 1958 (Bom XL of 1958) (hereinafter referred to as "the principal Act") shall have effect subject to the amendments specified in section 3.

3. Amendment of section 2. of Bom. XL of 1958.- "In the principal Act, in section 2,

(1). for clause (bb), the following clause

shall be and shall be deemed always to have been substituted with effect from the date of coming into force of the Bombay Electricity Duty (Gujarat Amendment) Act, 1983, (Guj. 17 of 1983), namely :-

(bb). "industrial undertaking" means an undertaking engaged predominantly in -

(i) the manufacture or production of goods (other than eatables or drinks), or,

(ii) any job work which results in the manufacture or production of goods (other than eatables or drinks);

but does not include a service undertaking:

Explanation.- For the purposes of this clause and clause (ee), an undertaking engaged in the manufacture or production of goods and also in any one or more of the activities specified in clause (ee),-

(a). shall be deemed to be -

(i). engaged predominantly in the manufacture of production of good (other than eatables or drinks) if the gross annual income of such undertaking from such manufacture or production for the accounting year of such undertaking preceding the period in respect of which the duty is levied is greater than the gross annual income of such undertaking for that accounting year from such activity or activities.

(ii). a service undertaking, engaged predominantly in any one or more of the activities specified in clause (ee) if the gross annual income of such undertaking from such activity or activities for the accounting year of such undertaking preceding the period in respect of which the duty is levied is greater than the gross

annual income of such undertaking for that accounting year from such manufacture or production.

(b). shall, until such gross annual income is available, be deemed to be an undertaking falling under sub-clause (i) or, as the case may be, sub-clause (ii) of clause (a), on the basis of the declaration made by the undertaking to such authority as the State Government may, by notification in the Official Gazette, specify; and on the availability and verification of such income, the undertaking shall be treated as if it had always been the undertaking to which sub-clause (i) or, as the case may be, sub-clause (ii) of clause (a) applied, having regard to such income;

(2). for clause (ee)

(a). the following clause shall be and shall be deemed always to have been substituted for the period commencing on the date of coming into force of the Bombay Electricity Duty (Gujarat Amendment) Act, 1983 and ending on the 21st July, 1987 (Guj. 17 of 1983), namely:

(ee). "service undertaking" means an undertaking which is engaged predominantly in all or any of the following activities irrespective of whether all or any of these activities result in the manufacture or production of goods, namely;-

(i) repairs, renovation, reconditioning, restoration, restitution or preservation,

(ii) cleaning.

(iii) polishing

(iv) cutting or pressing

(v). Drawing, stretching, twisting, rolling, re-rolling or orientation of non-ferrous and ferrous materials, including stainless steel materials,

(vi). case hardening, carbonising or any other surface treatment,

(vii) coating of any surface with any material.

(viii) electronic data processing.
(ix) such other activity as the State Government may, by notification in the Official Gazette, specify"

(b). the following clause shall be and shall be deemed always to have substituted with effect from the 22nd July, 1987, namely:

(ee) "service undertaking" means an undertaking which is engaged predominantly in all or any of the following activities, irrespective of whether all or any of these activities result in the manufacture or the production of goods, namely:-

(i) repairs, renovation, reconditioning, restoration, restitution or preservation,
(ii) cleaning
(iii) polishing
(iv) cutting or pressing
(v) case hardening, carbonising or any other surface treatment
(vi) electronic data processing
(vii) such other activity as the State Government may, by notification in the Official Gazette, specify."

11. It is absolutely clear that with a view to make the judgment ineffective, clause 4 of the Ordinance provided as under:-

"4. Bom. XL of 1958 as amended by this Ordinance to be effective notwithstanding any judgment etc. of any Court or other authority.-

(1). Notwithstanding anything contained in any judgment, decree or order of any court or other authority to the contrary, any levy or payment of electricity duty made or purporting to have been made by or to the State Government in respect of any service undertaking and any action or thing taken or done in relation to such levy or payment under the provisions of the principal Act during the period beginning with the commencement of the Bombay Electricity Duty Gujarat Amendment) Act, 1983 (Guj. 17, 1983) and ending with the day immediately preceding the date of the commencement of this Ordinance, shall be deemed to be as valid and effective as if such levy or

payment or such action or thing had been made, taken or done under the principal Act as amended by this Ordinance, and accordingly,

(a). xxx xxx xxx xxx

(b). xxx xxx xxx xxx

(c). xxx xxx xxx xxx

12. It is interesting to note that the words "service undertaking" by the aforesaid ordinance has been substituted w.e.f. 22nd July 1987 by deleting two items appearing in clause (ee). Earlier items appearing at clauses (v), (vii) have been deleted from the definition of "service undertaking" from 22nd July 1987 and thus, the petitioners activity of rolling, re-rolling etc. falling within sub-clause (v) and also in case of other types of work falling in sub-clause (vii) have been removed from the definition of "service undertaking" w.e.f. 22nd July 1987. This ordinance has been replaced by Act No. 7 of 1988 having the continued effect of the ordinance.

13. It is in view of this subsequent amendment, learned counsel has submitted that instead of challenging the decision delivered by the Division Bench of this Court, the executive wing of the State, by introduction of an ordinance and thereafter the legislature by a legislation, amended the Act which in effect made the judgment of a Division Bench of this Court inoperative and ineffective, which is not permissible under the law. Learned counsel submitted that this has been done only with a view to see that the amount which have been recovered from the manufacturers is not required to be repaid in view of the decision of the Division Bench in the case of Gujarat Re-Rolling Mills Association & Ors reported in 1988 (1) GLH 414 (supra).

14. It was submitted that if the State was aggrieved by the decision of this Court, the State should have challenged the judgment and if the same was set aside by the Apex Court, the State was not required to refund the amount which has been collected from the petitioners. It is submitted that the Division Bench of this Court earlier interpreted the words "service undertaking". In view of the interpretation of "service undertaking" accepted by the State and considering and comparing the words "service undertaking" as found in the provisions contained in the Act of 1983 and Ordinance of 1988 as well as Act of 1988, meaning of "service undertaking" remains the same. Reading the provisions of both the Acts and ordinance, it is clear that in effect there are no changes made therein and therefore the same meaning

will have to be given for words "service undertaking" and "industrial undertaking" appearing in the later ordinance and the Act.

15. A direction was given in case of Gujarat Re-Rolling Mills (Supra) as counsel for the State made a statement before the Court that if the petitioners ultimately succeed in the petitions, the respondent State shall refund the amount of difference in duty to the members of the petitioner No.1 Association without being required to take recourse to civil suit. It is in view of this statement made on behalf of the respondent State, no interim relief was granted by the Division Bench. Therefore the Court expressed a hope that in case the petitioner ultimately succeeds before the Collector, the respondent State would abide by the statement made before this Court to refund the amount of duty. However, it is surprising that instead of permitting the Collector to complete the exercise as per the decision of this Court, steps were taken to make the decision of this Court ineffective, and the petitioners being remediless, were constrained to challenge the provisions made in the Act.

16. Examining the scheme of provisions as amended w.e.f. 11.10.1983 by Act No. 17/83 and by Act No. 7/88, learned counsel Mr. Nanavati submitted that in effect there is no change in the amendment so far as clauses (bb) and (ee) are concerned. Both the clauses appearing in both the amendments have been reproduced by us earlier. Suffice it to say that reading both the clauses of the Acts, it conveys the same meaning. Under the circumstances, the words 'industrial undertaking' and 'service undertaking' as explained by Division Bench in case of Gujarat Re-Rolling Association (supra) holds the field even after amendment.

17. Learned counsel submitted that in fact, with a view to make the decision of the Division Bench inoperative, the Act is amended by Act No. 7/88. We have compared the clauses and in fact, it conveys the same meaning. Merely by changing the words or making change in the construction of sentences if the meaning remains the same, it is difficult to understand how the amended provisions can face with the situation which was prevailing at the earlier point of time before the Division Bench. Therefore, whether the new provision is required to be struck down on the grounds which are urged by Mr. Nanavati is the question before this Court.

18. Mr. Nanavati submitted that the inclusion of rolling/re-rolling in 'service undertaking' vitiates the

provisions contained in Article 14 of the Constitution of India. According to his submission, persons similarly situated are differently sought to be treated and the units not similarly situated are sought to be clubbed together. Units engaged in manufacturing for its own and the units manufacturing the products on behalf of others are sought to be treated differently. Mr. Nanavati, learned counsel urged that it is very clear that re-rolling activities are nothing but manufacturing activities. All the manufacturing concern are using the electricity, and similarly, the manufacturer engaged in production of rerolling is also using electrical enerty. How that can be separated from the group of industrial undertaking is not explained.

19. On merits, Mr. Nanavati submitted that when there is a question of units engaged in activities of steel re-rolling, it is always a process of manufacturing. Dictionary meaning of 'manufacture' is transform or fashion raw material into a changed form for use. In the case of M/S. DEVI DAS vs. STATE OF PUNJAB reported in AIR 1967 SC 1895, in paragraph 31, the Apex Court dealt with the question of manufacture when iron scrap is converted into rolled steel. We reproduce below paragraph 31 :-

> "Now, coming to Civil Appeals Nos. 39 to 43 of 1965, the first additional point raised is that when iron scrap is converted into rolled steel it does not involve the process of manufacture. It is contended that the said conversation does not involve any process of manufacture, but the scrap is made into a better marketable commodity. Before the High Court this contention was not pressed. That apart, it is clear that scrap iron ingots undergo a vital change in the process of manufacture and are converted into a different commodity, viz. rolled steel sections. During the process, the scrap iron loses its identity and becomes a new marketable commodity. The process is certainly one of manufacture."

20. As discussed in earlier part of the judgment, in view of the fact that the Division Bench explained earlier that in the process of such service any manufacture or production comes into existence, then also the said service undertaking which renders such service will fall under definition of 'industrial undertaking'. Submissions on behalf of the State contrary to what is stated clearly by the Bench cannot be accepted.

21. Learned counsel submitted that there must be rational basis for classification. If the material is converted into another form by one unit for itself and by other unit on behalf of other persons by the same procedure, then certainly this classification, viz. "industrial undertaking" and "service undertaking" insofar as the conversion process is concerned, if made differently applicable, would violate the provisions contained in the Constitution of India. He submitted, relying on the decision in the case of AYURVEDA PHARMACY vs. STATE OF TAMIL NADU reported in AIR 1989 SC 1230, that where the rate of Sales Tax was levied on the Ayurveda preparations on the ground that they contain high percentage of Alcohol, the Court held that it is discriminatory. Learned counsel submitted that though the process for formation of a new article or different articles being the same, by use of electricity, two different persons cannot be taxed differently.

22. It is clear that undertaking consuming electricity and engaged in manufacture or production of goods, irrespective of job work or otherwise are grouped under head of 'industrial undertaking'. Rolling or re-rolling as explained by the Apex Court and by the Division Bench in the case of the petitioner through its Association, would amount to a process of manufacture or production of goods. The undertakings engaged in process of manufacture or production, must be treated at par with other undertakings engaged in similar activities, namely manufacturing. Ofcourse, it is open for legislature to have different duties for different slabs of consumption of electricity in a manner which may not violate Article 14 of the Constitution of India or any other provisions of the Constitution of India, but to treat the undertaking as a service undertaking, there must be a valid classification. It appears that advisedly therefore, while amending the Act w.e.f. 22.7.1987 by Act No. 7 of 1988 activities of rolling and re-rolling etc. were deleted from the shadow of 'service undertaking'.

23. Learned counsel Mr. Nanavati for the petitioners submitted that considering the definition as found in clause (bb) for industrial undertaking and the definition interpreted by the Division Bench in the reported decision, definition of industrial undertaking refers to the manufacture or production of goods and it also refers to any job work which results in the manufacture or production of goods, it is very clear that when there is a conversion of the article it amounts to manufacture or production of goods. Therefore, according to Mr.

Nanavati, even if job work is carried out resulting in manufacturing of goods by the unit, it will have to be considered as industrial undertaking. To take out the activities of rolling or re-rolling from the aforesaid definition of industrial undertaking, there must be justifiable reason for classification. It is clear that in rolling or re-rolling for manufacture for itself or for others, in process of manufacturing, there will be consumption of electricity which is also the case with other undertakings engaged in manufacture or production of goods for their own or on job work basis. Therefore, without justifiable reason, it cannot be taken out from the definition of industrial undertaking.

24. The principles for valid classifications are well settled by catena of decisions of the Apex Court. The principles are that those grouped together in one class must possess a common characteristic which distinguishes them from those excluded from the group; and the characteristic or intelligible differentia must have a rational nexus with the object sought to be achieved by the enactment. The classification must not be arbitrary but must be rational. In order to pass the test two conditions must be fulfilled, namely: (1). that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that the differentia must have a rational relation to the object sought to be achieved by the Act. Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. Relying on this proposition as laid down in the decision of the Apex Court in the case of SHASHIKANT LAXMAN KALE vs. UNION OF INDIA reported in (1999) 4 SCC 366, Mr. Nanavati submitted that there is no justifiable reason for classification. He submitted that considering the nature of activities to be performed by a service undertaking, it is clear that the petitioner cannot stand in the category of service undertaking. Inviting our attention to a decision in the case of Gujarat Re-Rolling Mills (supra) he submitted that the petitioner unit in no case can be clubbed with service undertaking.

25. Mr. Nanavati, learned counsel for petitioner submitted that when legislature itself, while defining

industrial undertaking, took care to include job work resulting in manufacture, the same should be taken into consideration while examining the case. It is submitted on behalf of the respondent No.1 that the activities carried on by the petitioner falls in the category of service undertaking. This submission made by the learned counsel for the respondent cannot be accepted. It is not possible for us to agree for two reasons: (1). earlier decision of this Court is binding to the respondent State, and, even by amending the Act, no changes are made in defining clauses, and, (2). there is no justifiable reason for inclusion of re-rolling mills in service undertaking and exclusion of re-rolling mills from industrial undertaking.

26. Learned Advocate General appearing for the State drew our attention to the decision of this Court in the case of PRITHVI COTTON MILLS vs. BROACH MUNICIPALITY reported in AIR 1968 GUJ 124 wherein validity of house tax imposed by the Municipality was in question. Learned Advocate General put much emphasis and submitted that the decision is confirmed by the Apex Court. We will refer at the appropriate stage the said decision. Bills were presented by the Broach Borough Municipality. After presentation of the bills, the Apex Court decided on 26th March 1963 the case of PATEL GORDHANDAS HARGOVINDAS vs. MUNICIPAL COMMISSIONER, AHMEDABAD (AIR 1963 SC 1742). In that case, a tax designated as a rate imposed by the former Municipal Borough of Ahmedabad under section 73 of the Boroughs Act was challenged on two grounds, one of the grounds being that the Ahmedabad Municipality had levied a rate and that, therefore, the impost could be levied only on the annual letting value of the open land and not on its capital value. The later contention was upheld by the Supreme Court by a majority judgment. After the judgment, there was correspondence with the Municipality interalia contending that a house tax was illegal and cannot be claimed. The Municipality refused to stay its hands and coercive machinery was put into use. Thereafter some proceedings were initiated in the High Court. Before the second petition could be filed the State legislature passed Gujarat Imposition of Taxes by Municipality (Validation) Act, 1963 which came into force on 26th January 1964. By this later Act, the Legislature purported to validate the imposition, collection and recovery of taxes or rates assessed, inter alia, under the Boroughs Act and sought to confer authority on municipality to collect and recover such taxes. That action pursuant to the Act was challenged before the High Court. The High Court considered the submissions in detail. It appears that a Division Bench

of this Court was of the view that house tax levied on the basis of capital value of land and building, and, therefore, the tax is intra vires. The Court also held that the Validation Act is also intra vires State legislature. Learned Advocate General drew our attention to paragraph 23 of the judgment wherein the Court has observed as under:-

> "It is undoubtedly true that a decision on a point of law recorded in the judgment of Supreme Court, is the law of the land and it is binding on all courts in India. But it is important to notice that, the law so declared is the ordinary law of the land and is not constituent law. Article 141 expressly makes it binding on all Courts. It does not make it binding on Legislatures. The law so declared, being the ordinary law of the land can be changed by the Legislature acting within their respective fields. When a Legislature, for example, annuls a law declared by the Supreme Court, it performs a function which is assigned to it by the Constitution and does not encroach in any way upon Article 141 or any other provisions of the Constitution. It is quite clear that the Supreme Court does not make a law by delivering a judgment. it only, by a process of judicial interpretation or determination, declares what the law is. In the case of statute law, when the Supreme Court declares by interpretation what the true meaning of that statute is, it does not make any law for or on behalf of the Legislature, but it only interprets the legislative mind and declares what law the Legislature has ordained to be followed. Under the circumstances, in our judgment, there is no merit in the above contention or Mr. Nanavati that section 3 violates Article 141 of the Constitution".

26.1 Mr. Thakore, learned Advocate General submitted that the matter was carried before the Apex Court and the Apex Court has also dismissed the appeal the decision of which is reported in AIR 1970 SC 192.

27. Learned counsel Mr. Nanavati submitted that the Apex Court in the case of SHRI P.C. MILLS vs. BROACH MUNICIPALITY reported in AIR 1970 SC 192 has pointed out that when there is illegal collection of tax under an ineffective or invalid Act with retrospective validation, such Act can be made by legislature or not. The Court has pointed out that pre-requisite must be complied with.

In paragraph 4 of the judgment, the Apex Court pointed out as under:-

"Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or an invalid law, the cause for ineffectiveness or an invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a Court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules for both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting restrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon Courts. The legislature may follow anyone method or all of them and while it does so it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject matter and competence to

> make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax."

28. In the instant case, it is interesting to note from the Statement of the Ordinance that the respondents were conscious in the light of the decision of the Division Bench of this Court that substantial amount was required to be refunded as units have paid duty on the basis of "service undertaking" and certain units were required to be treated as "industrial undertaking". The Court did not grant stay on the statement made by the counsel for the State that amount of difference in case petitioners succeed will be refunded. Now, the intention is, therefore, as submitted by Mr. Nanavati very clear, of not refunding the tax amount collected not in accordance with law. By amending the Act, the State has nullified the mandate issued by the Court and thus by over-reaching the judicial verdict, as submitted by learned counsel Mr. Nanavati, the State has committed a fraud on the Constitution and there is colourable exercise of powers. It was submitted that the Division Bench of the High Court in the case of Gujarat Re-Rolling Mills Association (supra) did not declare the statute ultravires but only interpreted the statute. If the function of the Court is to interpret the law, then according to Mr. Nanavati, the proper remedy for the State was to prefer an appeal against the judgment to the Apex Court if the State was aggrieved. It is also clear from the statement of objects and reasons of ordinance that the interpretation made by the Court is not in consonance with the legislative intent. Legislature makes the laws and the Court has to interpret. In the decisions of the Apex Court in case of SHRI PC MILLS (supra) which we have quoted above, it is held that the validity of a Validating Law depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax. As indicated by us earlier, even by amending the definition by Act No. 7/88 and comparing the definitions as found in Act No. 17/83, it carries the same meaning. The

Court interpreted the definitions as found in Act No. 17/83 and pointed out that the activities of rolling and/or re-rolling would fall in the definition of industrial undertaking and not service undertaking. The Court clearly pointed out that if value or utility is added, then it will be service undertaking, but if the nature or character of the article gets changed or the use to which it can be put is different then it will have to be regarded as manufacture or production of new item which will make that undertaking as industrial undertaking. Even by amending the Act, the position remains the same. Even after amending the meaning conveyed is the same, then, in our opinion, there is no reason why these petitions should not be allowed. In making the validation, legislature has not removed the defects which were found in the existing law. Interpretation of later statute on 'industrial undertaking' and 'service undertaking' in view of the language used in the relevant sections, remains the same. As discussed in earlier part of the judgment, classification is not based on sound principles. There is no justification for inclusion of re-rolling mills in 'service undertaking' because (1). the words 'industrial undertaking' also includes job work which results in the manufacture or production; (2). in view of discussion in the earlier part of judgment, rolling and/or re-rolling cannot be covered by 'service undertaking' as by process of re-rolling a new product comes into existence, and, (3). no valid reason has been placed for excluding a manufacturing unit consuming electricity from "industrial undertaking" where others who are consuming electricity for manufacturing or producing the goods are placed, irrespective of the fact that they are either engaged in manufacture or production for their own or on job work basis.

29. In Special Civil Application No. 2460/89 Mr. Jhaveri submitted that the petitioner is engaged in manufacturing of tiles and is not engaged in job work. The appellate authority held in favour of the petitioner by holding that it is an industrial undertaking. Mr. Jhaveri submitted that merely because cutting and polishing are found in service undertaking, it does not automatically become service undertaking. If the petitioner himself is engaged in manufacture of marble tiles, it cannot be said that it is a service undertaking.

30. Mr. Nanavati also submitted that that as the units are not doing work for others and are engaged in re-rolling for its own sale etc. and benefit by no

stretch of imagination can be denied and submitted that the contention raised by respondent can not be accepted.

31. Legislature has the power to legislate for levy of taxes but that power cannot be used arbitrarily and in a manner inconsistent with the fundamental rights guaranteed to the people under the Constitution of India. No tax may be levied or collected under our constitutional set up except by authority of law and the law must not only be within the legislative competence of the State but it must also not be inconsistent with any provision of the Constitution. Even the validity of a taxing statute is open to question on the ground that it infringes fundamental rights - (AIR 1961 SC 552 and AIR 1963 SC 591) -. Tax cannot be collected, levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection there of and, secondly, the tax must be subject to the conditions laid down in Article 13 of the Constitution. Legislature shall not make any law which takes away or abridges the equality clause in Article 14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. The Apex Court also pointed out that in view of the inherent complexity of fiscal legislation admit a larger discretion to the Legislature in the matter of classification so long as it adhers to the fundamental principles underlying the doctrine of equality. The power of the legislature to classify is, it is said, of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways (1963) 3 SCR 309 = AIR 1963 SC 591).

32. Kerala Building Tax Act (19 of 1961) was considered by the Apex Court in the case of STATE OF KERALA vs HAJI K KUTTY reported in AIR 1969 SC 378. The legislature, in that case, had not taken into consideration in imposing tax the class to which a building belongs, the nature of construction, the purpose for which it is used, its situation, its capacity, its profitability, its user and other relevant circumstances which have a bearing on the matters of taxation. They have adopted merely the floor area of the building as the basis of tax irrespective of all other considerations. Where objects, persons, or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for refusal to make a rational classification may itself in some cases operate

as denial of equality.

33. In the instant case, we have to examine the scheme of the Act. In the Act of 1989, industrial undertaking was defined as engaged in the manufacture and production of goods or engaged in any job work involving the manufacture of the production of goods irrespective, whether any service of the nature specified in clause (ee) is involved in such job work. Thus wherever manufacturing activities were carried out by a unit whether on job work or not, it was to be considered as an industrial undertaking. Service undertaking introduced subsequently refers to the unit providing variety of services referred to in clause (ee). Rolling and re-rolling is an activity which is nothing but a production of goods. We have pointed out in this judgment the decisions of the Apex Court and of this Court. There is no earthly reason as to why the activities of rolling and re-rolling should have been placed in service undertaking though it is manufacturing activity. For classifying differently, there must be plausible explanation as to why activities involving manufacturing by or for the unit itself or on job work basis, rolling and re-rolling is included in service undertaking despite it is engaged in manufacturing activities or the activities of producing goods?. It is required to be noted that despite the petitioner is engaged in manufacture or production of goods, nothing is placed before us not to include it in industrial undertaking. What has weighed with taxing authority for exclusion is not explained. Thus when a unit is engaged in manufacture or production of goods with consumption of electricity, merely on the basis that it manufactures goods from scrap iron ingots converting it into different commodity, viz. rolled steel, different treatment cannot be given. It is clear that the units were converting rolled steel from the scrap and that has probably weighed with the authority but as it is engaged in manufacturing activity, without any recognized principle, arbitrarily it cannot be said that it is not an industrial undertaking and is a service undertaking. To us that would be nothing but violation of Article 14 of the Constitution of India. All the manufacturing units, irrespective of nature of transaction and different unit being manufacturing essentially dis-similar commodities are treated at par for the purpose of uniform tax but so far as the petitioner unit is concerned, viz. rolling or re-rolling activities are concerned, by discrimination, breach of Article 14 is committed.

34. It is required to be noted that the principle as

laid down by the Supreme Court with regard to validation law is required to be taken into consideration. In paragraph 6 of the judgment in the case of PC Mills, AIR 1970 SC 196 (supra), the Court pointed out that the legislature in section 73 had not authorised levy of a tax in the manner in which it was levied but had authorised levy of a rate. That led to the discussion whether a rule putting the tax on capital value of building answered the description of the impost in the Act, namely, a rate on buildings or lands or both situated within the Municipal Borough. After discussing about the rate the Court pointed out in paragraph 6 that

> " the exercise of power by the legislature was valid because the legislature does possess the power to levy a tax on lands and buildings based on capital value thereof, and in validating the levy on that basis, the implication of the use of the word 'rate' could be effectively removed and the tax on lands and building imposed instead. The tax, therefore, can no longer be questioned on the ground that section 73 spoke of a rate and the imposition was not a rate as properly understood but a tax on capital value."

34.1 Thus, the Apex Court pointed out that the legislature exercised the power to levy a tax which has been possessed by it. There was no question of provision being violative of Article 14 of the Constitution of India.

35. In view of what we have stated hereinabove, it is not possible for us to agree with the contentions raised on behalf of the State.

36. In view of what is stated above, it must be held that the inclusion of rolling and re-rolling as we find in item (v) of clause (ee) in sub-section (a) of Sec. 2 of the amending Act namely Bombay Electricity Duty (Gujarat Amendment) Act, 1988 (Gujarat Act No. 7 of 1988) whereby section 2 of Bombay Act XL of 1958, Bombay Electricity Duty Act is amended, is violative of Article 14 of the Constitution of India, and, therefore, the said sub clause v of clause (ee) in so far as it relates to rolling and re-rolling must be struck down being discriminatory and violative of Article 14 of the Constitution of India. As a result of this, the demand notice at Annexure 'A' is hereby quashed.

37. All these petitions are allowed with cost. Rule made absolute.

( D.M. DHARMADHIKARI, CJ. )

csm./ (B.C. PATEL, J. )